No. 21-

In the Supreme Court of the United States

JEFFREY OLSEN,

Petitioner,

V.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During the Covid pandemic, the Central District of California prohibited District Judges from conducting jury trials for nearly fourteen months. For most of this period, the state trial courts in the region were holding jury trials—ultimately more than 500—while the Central District held none. And for most of this period, the Central District convened grand juries in the same federal courthouses where jury trials were forbidden, so defendants were compelled to enter a criminal justice system from which there was no exit. Even where a District Judge determined that a jury trial could be held safely, and that the failure to provide one in a timely manner would violate the Speedy Trial Act, the Central District refused to allow the trial to proceed.

In a decision with "troubling implications that will extend well beyond the pandemic," as Judge Collins observed in his dissenting opinion below, the Ninth Circuit held that the District Judge could not dismiss the indictment under the Speedy Trial Act.

The Questions Presented are:

I. Whether a District Court may dismiss an indictment under the Speedy Trial Act, where the District Court finds that it is possible to hold a jury trial safely, but where a districtwide order forbids the holding of jury trials.

II. Whether a District Court may dismiss an indictment with prejudice as a remedy for a Speedy Trial Act violation where the court, not the prosecutor, is principally at fault for the delay.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit: *United States v. Olsen*, No. 20-50329 (Jan. 6, 2022)

U.S. District Court, Central District of California: *United States v. Olsen*, No. SACR 17-00076-CJC (Oct. 28, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey Olsen respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals and the court's order denying rehearing en banc are published at 21 F.4th 1036 (9th Cir. 2022). The original opinion of the Court of Appeals is published at 995 F.3d 683 (9th Cir. 2021). The opinion of the District Court is published at 494 F. Supp. 3d 722 (C.D. Cal. 2020).

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161 and 3162, are reproduced in Appendix G, App. 198a-207a.

STATEMENT

The rule of law is never more important than in times of crisis, when government officials are most likely to exceed their authority. The recent Covid pandemic has been a good example. No one can doubt that the government should do all it lawfully can to mitigate the effects of a pandemic. Yet we have repeatedly seen government officials try to do *more* than they lawfully can to curb the pandemic. For example,

- The federal government exceeded its statutory authority to regulate workplace safety. *National Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022).
- The Centers for Disease Control and Prevention unlawfully prohibited evictions. *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021). So did New York. *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021).
- California and New York repeatedly infringed the freedom of worship. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

In cases like these, government officials sought to push their authority to its limits to stop the spread of Covid. But some officials, in their understandable zeal to fight the pandemic, pushed their authority *past* its limits. With the best of intentions, they purported to exercise a power they did not in fact possess.

The present case is one more example. During the pandemic, the Central District of California held no jury trials for nearly fourteen months. Meanwhile, virtually everything else in the region reopened. Jury trials took place in state courthouses, some located right across the street from Central District courthouses. Grand juries convened in the same

Central District courthouses that were closed to jury trials. But defendants indicted in the Central District were forced into a pipeline from which there was no exit. They waited in vain for their trials to begin. Many languished in jail. All were left in limbo with unresolved criminal charges hanging over their heads. In the present case, even when a District Judge pleaded with the Chief Judge of the Central District to allow him to conduct a jury trial, the Chief Judge refused.

In the Speedy Trial Act, Congress set forth requirements that must be satisfied before the District Courts may postpone trials. These requirements were not satisfied here. In reversing the District Court's dismissal of the indictment, the Court of Appeals for the Ninth Circuit badly misinterpreted the text of the Speedy Trial Act in several ways, some of which create conflicts with other circuits, and all of which establish terrible precedent for future crises.

Even in a pandemic, government officials, including judges—indeed, especially judges—must follow the law. As Judge Collins put it in his dissent below, the Ninth Circuit "should not have let the Speedy Trial Act be counted among Covid's latest casualties." App. 65a. The Court should grant certiorari and reverse.

1. Statutory background

The Speedy Trial Act, 18 U.S.C. § 3161 et seq., provides precise time limits within which each stage of a criminal prosecution must commence. Under the provision relevant here, the trial must begin within 70 days of the indictment. § 3161(c)(1). The Act enforces these time limits with a mandatory sanction of

dismissal. If this 70-day limit is exceeded, the indictment "shall be dismissed on motion of the defendant." § 3162(a)(2). "[T]he Act serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate v. United States*, 559 U.S. 196, 211 (2010).

The Speedy Trial Act lists several periods of delay that are excluded from the 70-day limit. 18 U.S.C. § 3161(h). All but one of these exclusions are for specific circumstances not relevant here, such as delays caused by competency proceedings or pretrial motions. But the Act includes one general exclusion that is available for courts to use in some emergencies. This "ends-of-justice" provision excludes periods of delay "resulting from a continuance . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." § 3161(h)(7)(A).

The Act lists four factors the judge must consider in determining whether to grant an ends-of-justice continuance. § 3161(h)(7)(B). The only factor relevant here is the first, which requires the judge to consider "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." § 3161(h)(7)(B)(i). This was the only factor that was cited by the government or the Ninth Circuit to justify the Central District's suspension of jury trials.

2. Jeffrey Olsen is indicted.

Petitioner Jeffrey Olsen is a physician. In July 2017, he was indicted in the Central District of Cali-

fornia on 34 counts of prescribing drugs without a legitimate medical purpose and one count of making a false statement to the DEA. App. 7a. Olsen pleaded not guilty. *Id.* at 8a. He was released on bond. *Id.*

Pretrial proceedings lasted for nearly three years, because both sides had difficulty processing the extraordinary number of documents relevant to the case. In September 2017, when the government had produced more than 30,000 pages of material, the parties agreed to a continuance until January 2018 to allow defense counsel to read it all. *Id.* at 66a. By January, the government had produced nearly 200,000 pages, much of it consisting of handwritten documents that could not be converted to a searchable format, so the parties agreed to another series of delays. *Id.* at 67a-68a. Further delay was occasioned when retained defense counsel withdrew and new counsel had to be substituted. *Id.* at 67a. New counsel discovered that most of the electronic files produced by the government had been corrupted, which necessitated yet another delay. *Id.* at 68a. Finally, in early 2020, discovery had been completed and the case was scheduled for trial in May.

By then, however, the pandemic had begun.

3. The Central District suspends jury trials.

When the Covid pandemic began in March 2020, the Chief Judge of the Central District of California issued an emergency order suspending all jury trials in the district. *Id.* at 6a. The Chief Judge then issued further orders likewise suspending all jury trials in April 2020, May 2020, and August 2020. *Id.* The last of these orders had no end date. Finally, in April 2021, the Chief Judge ordered that jury trials would

resume in May 2021. *Id.* at 7a. The Central District thus went nearly fourteen months without conducting any jury trials. In deciding when jury trials would be permitted to resume, the Central District relied on the State of California's "Blueprint for a Safer Economy," *id.* at 126a & n.3, the same guidelines the State used to restrict church services. *See Tandon*, 141 S. Ct. at 1298.

Other courts had long since resumed holding jury trials, with special safety precautions to protect the health of all participants. The Orange County Superior Court, which sits right across the street from the Central District courthouse in Santa Ana where Olsen would be tried, resumed jury trials in June 2020, eleven months before the Central District did. App. 133a. Between June and September 2020 the Orange County Superior Court held 86 jury trials. *Id.* Jury trials had likewise resumed in other federal districts. Just over the county line, the Southern District of California resumed jury trials in August 2020, nine months before the Central District did. S.D. Cal. Chief Judge Order No. 36 (Aug. 24, 2020).[1] By March 2021, 657 petit juries had been selected in federal courts nationwide. U.S. Courts, *Federal Judicial Caseload Statistics* (Mar. 31, 2021), table J-2.[2] None was in the Central District of California.

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[1] https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2036.pdf.

[2] https://www.uscourts.gov/statistics/table/j-2/federal-judicial-caseload-statistics/2021/03/31.

4. The District Court denies the government's request for a continuance.

When the pandemic began, the parties agreed to postpone the trial until October 13, 2020. App. 69a. In August 2020, the government requested yet another continuance, to December. *Id.* The District Court denied the government's request. *Id.* at 151a-197a.[3]

The District Court found it "[m]ost troubling" that "the government wants to continue Mr. Olsen's trial even though grand juries are convening in the same federal courthouse in Orange County where Mr. Olsen's trial would take place and state courts, just across the street from the federal courthouse, are conducting criminal jury trials." *Id.* at 152a. The District Court observed: "Clearly, conducting a jury trial during this coronavirus pandemic is possible. Yet the government wants the Court not to even try to do so for Mr. Olsen." *Id.*

Under the Speedy Trial Act, the District Court explained, the trial had to begin by October 27, unless the government's requested delay could be excluded under the Act's ends-of-justice provision. *Id.* at 153a & n.1. But the District Court determined that the ends of justice would not be served by further delay. *Id.* at 162a-163a. The Act required the court to consider whether, without a delay, holding a trial would be "impossible." 18 U.S.C. § 3161(h)(7)(B)(i). The court noted that this provision "has been used in response to natural disasters and

[3] Appended to the District Court's order are graphic and tabular exhibits that cannot be reproduced in 12-point type. App. 164a-197a. We have reproduced them as they appear in the Federal Supplement.

other exigencies, but only where the triggering exigency made the criminal jury trial a physical and logistical impossibility." App. 156a. Examples included Hurricane Katrina in 2005 and the September 11 terrorist attacks in 2001, when for a brief time it was not possible to conduct jury trials in the affected cities. *Id.*

The District Court concluded that the Covid pandemic, by contrast, did not render a jury trial impossible in October 2020. "There is no question that the current pandemic is serious," the court acknowledged. *Id.* at 157a. "But under the current circumstances, it is simply not a physical or logistical impossibility to conduct a jury trial." *Id.* "Although some aspects of the practice of law may be less convenient during this time when many are practicing social distancing," the court observed, "no one contends that it is not possible to perform necessary trial preparations. Nor does anyone argue that there is insufficient courthouse staff available to facilitate a trial." *Id.*

Indeed, the court noted, "if one had any doubt about the possibility of conducting a jury trial during the pandemic, one need look no further than the very courthouse in which Mr. Olsen seeks to have his jury trial." *Id.* In that courthouse, "between June 24 and August 18, 2020, a grand jury convened and returned twenty-six indictments." *Id.* "That means that the grand jury, which has at least 16 people on it, gathered in person in the Santa Ana courthouse numerous times. While they gathered, they heard testimony from witnesses and deliberated together." *Id.* at 157a-158a. If it was possible to convene a grand jury in the very same courthouse, the District

Court determined, "the Court surely can hold a jury trial for Mr. Olsen in that courthouse." *Id.* at 158a.

"Even more compelling," the District Court continued, "is the fact that the state court across the street from the Orange County federal courthouse has resumed jury trials with appropriate precautionary measures." *Id.* The District Court noted that the state court held no jury trials in April or May 2020 due to the pandemic, but that it resumed jury trials in June with appropriate precautions, and that the state court held 46 criminal jury trials between June and August. *Id.* The District Court concluded: "If it is not impossible to hold grand juries in the courthouse where Mr. Olsen's trial will take place, and it is not impossible to hold criminal jury trials in the state court across the street from that courthouse, it is clearly not impossible to hold a criminal jury trial for Mr. Olsen." *Id.* at 159a.

The District Court rejected the government's contention that jury trials were rendered impossible by the Chief Judge's General Order forbidding them. *Id.* The court found it "[p]articularly troubling" that the General Order "is indefinite" in duration, in contrast to the Speedy Trial Act's requirement that "ends of justice" delays be specifically limited in time. *Id.* at 160a. "What is more," the District Court continued, "an 'ends of justice' exclusion must be justified with reference to specific factual circumstances in the particular case," but the General Order was a blanket continuance that applied to all cases, regardless of their factual circumstances. *Id.* at 161a.

The District Court accordingly denied the government's request for a continuance. *Id.* at 163a. Instead, the District Court asked the Chief Judge of

the Central District to direct the District's Jury Department to summon jurors for a trial that would begin on October 13, 2020. *Id.* at 163a.

The Chief Judge of the Central District denied the District Court's request to summon jurors. *Id.* at 148a-150a.

5. The District Court dismisses the indictment.

On October 14, 2020, the District Court dismissed the indictment with prejudice, but the court postponed the effective date of the dismissal until October 28, when the Speedy Trial Act's time limit would expire. *Id.* at 121a-147a.[4] The District Court held that any further delay would violate Mr. Olsen's right to a speedy trial under both the Speedy Trial Act and the Sixth Amendment. *Id.* The court analyzed the statutory and constitutional speedy trial rights together because the court found that the same factors predominated in both. *Id.* at 140a n.12.

The District Court reiterated that continuances past October 28 could not be excluded under the Act's ends-of-justice provision, because such exclusions were appropriate only where holding a trial would be "impossible," 18 U.S.C. § 3161(h)(7)(B)(i), and it was not impossible to hold a trial. App. 129a-131a. The court noted again that grand juries were convening and indicting defendants in the federal courthouse and that jury trials had long since resumed in the state courthouse across the street. *Id.* at 132a-133a. The court explained that it was pre-

[4] Appended to the District Court's order are tabular exhibits that cannot be reproduced in 12-point type. App. 146a-147a. We have reproduced them as they appear in the Federal Supplement.

pared to take the same "numerous careful measures to ensure safety" that had successfully been employed by the state court, which "accommodates social distancing by staggering times for juror reporting, trial start, breaks and concluding for the day, seating jurors during trial in both the jury box and the audience area, marking audience seats, and using dark courtrooms as deliberation rooms." *Id.* at 133a. The District Court added that the state court "regularly disinfects the jury assembly room and restrooms, provides facial coverings, uses plexiglass shields in courtrooms, and requires trial participants to use gloves to handle exhibits." *Id.* "[S]imilar safety precautions could have been in place for Mr Olsen's trial," the court noted, "had the Central District allowed this Court to hold one." *Id.*

The District Court also discussed the heavy burden on the administration of justice imposed by the Central District's moratorium on jury trials. "The problem has gotten so bad," the court pointed out, "that people charged with crimes in California, and whose families and lawyers are in California, are being transported without notice to Arizona because there is simply no longer bed space in the Central District to house them." *Id.* at 136a. "Even more disturbing," the court continued, "is the fact that the government is now offering favorable deals to defendants to incentivize them to plead guilty," because of the "exigencies manufactured by the Central District's refusal to resume jury trials." *Id.* at 137a-138a.

The District Court expressed exasperation with the fact that virtually every other workplace in Or-

ange County had reopened. *Id.* at 138a. "Quite frankly," the court explained,

> the Court is at a loss to understand how the Central District continues to refuse to resume jury trials in the Orange County federal courthouse. The Internal Revenue Service, the Social Security Administration, and other federal agencies in Orange County are open and their employees are showing up for work. Police, firefighters, and other first responders in Orange County are all showing up for work. Hospitals and medical offices in Orange County are open to patients and the medical professionals are showing up for work. Grocery stores, hardware stores, and all essential businesses in Orange County are open and their employees are showing up for work. State courts in Orange County are open and holding jury trials. Orange County restaurants are open for outdoor dining and reduced-capacity indoor dining. Nail salons, hair salons, body waxing studios, massage therapy studios, tattoo parlors, and pet groomers in Orange County are open, even indoors, with protective modifications. Children in Orange County are returning to indoor classes at schools, with modifications. Even movie theaters, aquariums, yoga studios, and gyms in Orange County are open indoors with reduced capacity. Yet the federal courthouse in Orange County somehow remains closed for jury trials. The Central District's refusal to resume jury trials in Orange County is indefensible.

Id. at 138a-139a.

The District Court then considered the appropriate remedy. *Id.* at 139a. Under the Speedy Trial Act, the court noted, dismissal of the indictment is mandatory, so the only question was whether to dismiss with or without prejudice. *Id.* at 139a-140a. In making this determination, the court consulted the three factors specified in the Speedy Trial Act: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2).

The court determined that the first factor, the seriousness of the offense, weighed in favor of dismissal without prejudice. App. 140a-141a. But the court held that the other two factors weighed in favor of dismissal with prejudice. *Id.* at 141a-144a. On the second factor, the "facts and circumstances" were that the Chief Judge of the Central District had refused to summon jurors for Mr. Olsen's trial, despite his knowledge that grand juries were convening in the same courthouse and that jury trials were taking place in the state courthouse across the street. *Id.* at 141a-142a. On the final factor, the District Court concluded that "barring reprosecution in this case by dismissing with prejudice is the only sanction with enough teeth to create any hope of deterring any additional delay in the resumption of jury trials." *Id.* at 143a. A dismissal without prejudice, by contrast, "allows the government simply to go before the grand jury, obtain a new indictment, and proceed as if no constitutional violation ever occurred." *Id.* If that were to happen, "there would be no adverse consequences from the Central District's knowing and

willful decision to violate Mr. Olsen's constitutional right to a public and speedy trial." *Id.*

Two weeks later, when the time allowed for trial by the Speedy Trial Act had expired, the District Court issued a short order dismissing the indictment with prejudice. *Id.* at 119a-120a. By then, the court noted, one hundred jury trials had been conducted in the state courthouse across the street. *Id.* The District Court concluded: "The state court and the terrific citizens of Orange County are to be commended for their commitment to the Constitution. Hopefully, someday, sooner rather than later, the Central District will show that same commitment." *Id.* at 120a.

6. The Court of Appeals reverses.

The Court of Appeals reversed and remanded with instructions to reinstate the indictment and to grant an appropriate continuance under the ends-of-justice provision of the Speedy Trial Act. *Id.* at 96a-118a.

The Court of Appeals held that the District Court erred in considering "only whether it was physically impossible to hold a trial." *Id.* at 109a. The Court of Appeals concluded that it *was* impossible to hold a jury trial, despite the physical possibility of holding one, due to the Central District's moratorium on jury trials. *Id.* "Because not granting the government's continuance meant that the Speedy Trial Act clock would necessarily expire before Olsen could be brought to trial," the court reasoned, "it follows that the district court's 'failure to grant' an ends of justice continuance in this case *did* make 'a continuation of [Olsen's] proceeding impossible.'" *Id.* (quoting 18 U.S.C. § 3161(h)(7)(B)(i)).

The Court of Appeals also held that the District Court erred in failing to consider whether not granting a continuance would "'result in a miscarriage of justice.'" *Id.* at 110a (quoting 18 U.S.C. § 3161(h)(7)(B)(i)). The Court of Appeals determined that "the district court's failure to grant the government's motion and subsequent dismissal of Olsen's indictment, under the unique facts of Olsen's case and the Central District's suspension of jury trials, resulted in a miscarriage of justice." *Id.* at 111a.

The Court of Appeals also faulted the District Court for failing to consider "non-statutory factors" along with the factors enumerated in the Speedy Trial Act. *Id.* at 111a. The Court of Appeals listed seven non-statutory factors it found relevant:

> (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.

Id. at 112a. This "non-exhaustive list" of factors, the Court of Appeals explained, "facilitates the proper balancing of whether the ends of justice served by granting a continuance outweigh the best interest of

the public and the defendant in convening a speedy trial." *Id.* at 113a.

Finally, the Court of Appeals added that the District Court abused its discretion in dismissing the indictment with prejudice rather than without prejudice. *Id.* at 114a-117a. The Court of Appeals held that the District Court "committed legal error in failing to consider key factors relevant to Olsen's case: the absence of prosecutorial culpability and the multiple continuances requested by Olsen." *Id.* at 116a.

The Court of Appeals did not address Olsen's Sixth Amendment speedy trial claim, because it found that "the basis for the district court's dismissal order was statutory only." *Id.* at 110a n.8.

7. Judge Collins dissents from the denial of rehearing en banc.

In response to Olsen's petition for panel rehearing and rehearing en banc, the Court of Appeals issued an amended opinion and denied rehearing en banc. *Id.* at 1a-95a.

The panel's amended opinion was identical in all relevant respects to its original opinion. *Id.* at 1a-24a.

Judge Murguia and Judge Christen, the two Circuit Judges who were on the three-judge panel, concurred in the denial of rehearing en banc. *Id.* at 24a-42a. (The third judge on the panel was a District Judge sitting by designation.) In their concurring opinion, Judges Murguia and Christen defended the panel opinion from the critiques levelled by Judge Collins in his dissent from the denial of rehearing en banc.

Judge Bumatay also concurred in the denial of rehearing en banc. *Id.* at 42a-60a. Judge Bumatay reviewed the history of the Sixth Amendment's speedy trial clause and concluded there had been no constitutional violation. *Id.* at 45a-56a. Judge Bumatay agreed with Judge Collins that the panel had erred in determining that it would have been "impossible" to hold a jury trial. *Id.* at 57a. But he concurred in the denial of rehearing en banc because he agreed with the panel that in evaluating whether to postpone the trial to avoid a "miscarriage of justice," the District Court should have considered the government's interest in pursuing Olsen's prosecution. *Id.* at 57a-59a.

Judge Collins, joined by Judge Forrest, dissented from the denial of rehearing en banc. *Id.* at 60a-95a. He noted that "in its determination to uphold this unprecedented and disturbing suspension of a crucial constitutionally-based right, the panel's decision egregiously misinterpreted the Act's ends-of-justice exception in a way that does serious damage to this critically important statute." *Id.* at 64a. He suggested that "[t]hese errors, which fundamentally alter and misunderstand how the statute works, have troubling implications that will extend well beyond the pandemic." *Id.*

Judge Collins explained, *id.* at 73a, that in seeking an ends-of-justice continuance under the Speedy Trial Act, the government relied solely on the first of the four enumerated factors a court must consider: "Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i).

Judge Collins identified seven distinct errors in the panel's interpretation of this provision.

First, he explained, the panel erred by citing the Central District's own moratorium on jury trials as the reason for finding it "impossible" to begin the trial in a timely manner. App. 74a-75a. "By allowing the Central District's General Order to serve as the source of the impossibility that justifies a continuance," Judge Collins observed, "the panel's analysis rests on a bootstrap argument that permits a wholesale evasion of the impossibility standard." *Id.* at 75a. He explained that the relevant question was whether *Covid conditions* made a trial impossible, a question addressed neither in the General Order nor in the panel opinion. *Id.* at 76a-77a, 79a.

Second, he noted, the panel erred by approving a moratorium on jury trials that "was entirely open-ended," with no expiration date, contrary to the statute's requirement that ends-of-justice continuances be specifically limited in time. *Id* at 77a.

Third, he observed, the panel erred by permitting the Central District to "issue blanket, district-wide exclusions of time under the ends-of-justice exception," a practice that "directly contravenes the Speedy Trial Act's requirement of individualized case-specific consideration." *Id.* at 79a.

Fourth, Judge Collins criticized the panel for its failure "to articulate *any* standard for assessing how much practical difficulty would satisfy the Act's 'impossible' factor." *Id.* at 81a. He explained that "under any reasonable interpretation of that factor, the district court correctly concluded that it was not met here." *Id.* Because "state courts in the counties comprising the Central District ultimately conducted

over 500 jury trials by March 2021," it was "clear that conducting federal criminal jury trials in Orange County was *not* 'impossible,' under any reasonable understanding of that term." *Id.* at 82a.

Fifth, Judge Collins accused the panel of having "watered down the Speedy Trial Act's demanding impossibility standard" by inventing seven non-statutory factors the District Court should have considered. *Id.* at 84a. He acknowledged that "the four statutory factors for applying the ends-of-justice exception are not exhaustive, because they are introduced by the phrase 'among others.'" *Id.* He continued: "But the fact that other factors may also be considered does not provide a license for rewriting the statutory factors in order to evade their limits." *Id.* Judge Collins noted that the panel applied these non-statutory factors itself rather than remanding for the District Court to apply them. *Id.* at 85a. But he observed that the panel actually applied only one of its seven non-statutory factors—"whether the district court has the ability to safely conduct a trial." *Id.* Judge Collins concluded that the panel had effectively replaced the demanding statutory standard, whether a trial was "impossible," with a far less demanding "safety" standard of its own invention. *Id.* at 86a.

Sixth, he observed, the panel erred "by shifting the burden of proof on the issue of impossibility (or safety) from the Government to Olsen." *Id.* at 87a. The panel relied on the absence of any evidence in the record as to the safety of the trials being held in state courts, but, as Judge Collins put it, "[t]his is completely backwards. Because the *Government* was the one moving for a continuance, it had the burden

to establish that the continuance was justified under the Act." *Id.*

Seventh, and finally, Judge Collins found that "perhaps the most worrisome aspect of the panel's decision relates to its alternative invocation of the second prong of the statutory factor in § 3161(h)(7)(B)(i), namely, whether a failure to grant a continuance would 'result in a miscarriage of justice.'" *Id.* at 89a. Judge Collins expressed astonishment that the panel had cited the dismissal of the indictment itself as the miscarriage of justice. *Id.* at 89a-90a. He explained: "This startling holding—that the Speedy Trial Act's own mandatory remedy of dismissal *itself* can constitute the 'miscarriage of justice' that requires *granting* a continuance so as to avoid the unjust dismissal—is demonstrably wrong and effectively guts the mandatory nature of the remedy." *Id.* at 90a.

Judge Collins observed that "[t]he 'miscarriage of justice' exception is addressed to whether more time is needed in order to ensure that the fairness of the trial proceedings *themselves*, including the integrity of the trial's fact-finding, is preserved." *Id.* He noted that "construing the 'miscarriage of justice' factor to authorize exclusions of time for the *express* purpose of avoiding the Act's mandatory remedy of dismissal in § 3162 would effectively eliminate the mandatory nature of that remedy." *Id.* at 92a.

Judge Collins agreed with the panel that the District Court should have dismissed the indictment without prejudice rather than with prejudice. *Id.* at 94a. As to the main part of the panel's decision, however, he concluded: "It is hard to overstate how destructive this holding is to the Act's mandatory dis-

missal remedy." *Id.* at 95a. Judge Collins added: "By allowing continuances to be granted … on the ground that the defendant does not deserve the Act's mandatory remedy, the panel's decision threatens to destroy a central feature of this singularly important statute." *Id.*

REASONS FOR GRANTING THE WRIT

Judge Collins is exactly right. The decision below twists the text of the Speedy Trial Act beyond recognition. The Act permits the exclusion of time where holding a trial would be "impossible," but if the supposed impossibility could consist of the court's own order prohibiting trials, any court could evade the Act's requirements simply by issuing such an order. The Act permits the exclusion of time where the failure to grant a continuance would "result in a miscarriage of justice," but if the dismissal of the indictment itself could constitute the supposed miscarriage of justice, courts could exclude time under virtually any circumstances, and dismissal would no longer be the mandatory remedy that the Act requires. In its effort to defend the Central District's moratorium on jury trials, the Ninth Circuit has drained the Speedy Trial Act of most of its power.

Three other aspects of the decision below create or exacerbate circuit splits. One is a conflict over which party bears the burden of proof regarding an exclusion of time under the Speedy Trial Act. Every other circuit to address the question places the burden on the party seeking the continuance—here, the government—but the Ninth Circuit placed the burden on the defendant. The second conflict is over whether time can be excluded under this provision of the Act

without case-specific findings as to the necessity of the delay. The Ninth Circuit said "yes," but every other circuit to address the question has said "no." The third split is over whether ends-of-justice continuances may be open-ended, or whether they must be limited in time. On this issue, the decision below adds to a circuit conflict that has existed for many years.

The Ninth Circuit also erred in holding that because the court, not the prosecution, was principally at fault for the delay, the District Court lacked the discretion to dismiss the indictment with prejudice. This holding creates a conflict with decisions of several other circuits, which have recognized that the Speedy Trial Act authorizes dismissal with prejudice where the primary fault for the delay lies with the court rather than with the prosecution.

The Court should grant certiorari on both questions and reverse.

I. The Court should decide whether a District Court may dismiss an indictment under the Speedy Trial Act, where the District Court finds that it is possible to hold a jury trial safely, but where a districtwide order forbids the holding of jury trials.

The Ninth Circuit reversed the District Court's dismissal of the indictment based solely on the provision of the Speedy Trial Act that instructs the District Court to "consider … [w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding im-

possible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i).

This question is so important, and the Ninth Circuit's decision is so egregiously wrong, that the Court should review the decision below even though the Ninth Circuit is the first Court of Appeals to address whether a moratorium on jury trials during the Covid pandemic was consistent with the Speedy Trial Act.

The question is important because it affects an enormous number of cases. To begin with, it affects virtually every criminal defendant whose trial was scheduled to begin during the period when the District Courts were closed. In the Central District of California alone, we are aware of many cases stacked up behind this one that raise the same issue. The question will also affect countless defendants whenever we experience another crisis of comparable magnitude. The next time the courts temporarily close due to natural disaster, or war, or terrorist attack, or another pandemic, the decision below will stand as precedent for the approximately twenty percent of the population who live in the nation's largest circuit.

The decision below is also egregiously wrong, for the reasons identified by Judge Collins.

First, the Ninth Circuit held that without a continuance, a trial before the Speedy Trial Act deadline would be "impossible," because the Central District itself had prohibited trials. App. 15a. This cannot be what the statute means by "impossible." If it were, any court could evade the Act's requirements simply by declaring that it will hold no trials. So far as we are aware, no other court has ever interpreted the

Act in so nonsensical a manner, to allow a court to create its own impossibility.

To make any sense, "impossible" must mean impossible due to some circumstance beyond the court's control, such as disaster or illness. This is how all other courts have interpreted the term. *See, e.g.*, *United States v. Correa*, 182 F. Supp. 2d 326, 327 (S.D.N.Y. 2001) (noting that it was "impossible" to hold proceedings in lower Manhattan during the period immediately after the September 11 attack); *United States v. Johnson*, 996 F.2d 312 (10th Cir. 1993) (table), at *3 (noting that it was "impossible" to hold proceedings while the judge underwent surgery for cancer).

Covid, of course, was a circumstance beyond the court's control. In the early months of the pandemic, when nearly all workplaces were closed, it was indeed impossible to hold a trial, and for this reason the early months of the pandemic were properly excluded from the speedy trial clock. By October 2020, however, when the District Court reached its decision, seven months had passed. Workplaces all over southern California had reopened with measures to mitigate the risk. App. 138a-139a. The state courts had long since resumed holding jury trials with appropriate safety protocols, including in the courthouse right across the street. *Id.* It was no longer impossible for a federal court to hold a trial. No doubt for this reason, the Ninth Circuit did not hold that *Covid* rendered a trial impossible in the fall of 2020. Rather, the Ninth Circuit conceded that "the district court could physically hold a trial," and held instead that the Central District's order banning tri-

als was what rendered a trial impossible. *Id.* at 14a-15a. That can't be right.

Second, the Ninth Circuit interpreted the statutory phrase "miscarriage of justice" in a way that deprives the Speedy Trial Act of any effect. In deciding whether to grant an ends-of-justice continuance, the trial judge must consider "[w]hether the failure to grant such a continuance in the proceeding would … result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i). The Ninth Circuit held that this provision required the District Court to grant a continuance, because without one, the "subsequent dismissal of Olsen's indictment" would have "resulted in a miscarriage of justice." App. 17a.

As Judge Collins correctly pointed out, *id.* at 89a-94a, this holding cannot be squared with the text of the Speedy Trial Act. The Act *requires* dismissal of the indictment as a remedy. 18 U.S.C. § 3162(a)(2). If the trial judge could decline to dismiss an indictment on the ground that dismissal would be a miscarriage of justice, dismissal would no longer be a mandatory remedy.

The Speedy Trial Act does authorize the trial judge to consider the seriousness of the charge, but only in choosing whether to dismiss the indictment with or without prejudice. In making this choice, the judge is required to consider, among other factors, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." § 3162(a)(2). Dismissal of the indictment is mandatory, but dismissal *with prejudice* is discretionary, and here the trial judge may consider the "justice" of

letting a serious charge go unprosecuted. The Ninth Circuit erred in allowing this consideration to inform whether the indictment would be dismissed in the first place.

The "miscarriage of justice" in section 3161(h)(7)(B)(i) refers, not to whether *dismissal* would be unjust, but to whether the *trial* would be conducted unjustly if it were held without a continuance. This is how the phrase has been interpreted by other courts. *See, e.g.*, *United States v. Hill*, 197 F.3d 436, 443 (10th Cir. 1999) (holding that it would be a "miscarriage of justice" if the prosecution were forced to proceed without its key witness); *United States v. Crane*, 776 F.2d 600, 605 (6th Cir. 1985) (observing that it could be a "miscarriage of justice" if defense counsel were forced to begin the trial before he was prepared).

Third, the Ninth Circuit erroneously placed on the defendant the burden of proving that it would be safe to hold a trial. The Ninth Circuit based its decision on its finding that "[n]othing in the record indicates that the Central District was able to hold a jury trial safely in October 2020." App. 20a n.10. As Judge Collins observed, *id.* at 87a, the party *seeking* a continuance bears the burden of proof as to whether the ensuing delay is excludable under the Speedy Trial Act. Here, the prosecution sought the continuance, so it should have been the prosecution's burden to prove that a trial in October 2020 would be *unsafe*, not Olsen's burden to prove that a trial could be conducted safely. The absence of record evidence as to safety indicates that the prosecution did not sustain its burden of proving that it would be impossible to hold a trial.

In misallocating the burden of proof, the Ninth Circuit created a circuit split. Every other circuit to address the issue has held that the party seeking the continuance bears the burden of proof as to the excludability of time. *See United States v. Burrell*, 634 F.3d 284, 287 (5th Cir. 2011) (where the government seeks a continuance, "the Government bears the burden of establishing the applicability of this exclusion"); *United States v. Gonzales*, 137 F.3d 1431, 1435 (10th Cir. 1998) (where the government seeks a continuance, its request for an exclusion of time "must be supported by the information and evidence presented to the district court"); *United States v. Kelley,* 36 F.3d 1118, 1126 n. 5 (D.C. Cir. 1994) ("The burden is on the movant to show that the 'ends of justice' require a continuance of the trial."); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 375 (2d Cir. 1979) ("[I]t seems to us that the burden is on the government or the court to set forth in the record what are excludable periods or at least what are the operable facts leading to the exclusion.").

Fourth, the Ninth Circuit erred in flouting the Speedy Trial Act's command that an ends-of-justice continuance may be justified only by the specific needs of the individual case. The statute provides that no delay resulting from an ends-of-justice continuance is excludable "unless the court sets forth, in the record of the case, … its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). As this Court has explained, "[t]his provision gives the district court discretion—within

limits and subject to specific procedures—to accommodate limited delays *for case-specific needs*." *Zedner v. United States*, 547 U.S. 489, 499 (2006) (emphasis added).

Here, by contrast, after the District Court thoroughly considered the specific circumstances of the case and denied the government's request for an ends-of-justice continuance, the Ninth Circuit held that the District Court was required to grant the continuance, based on a circumstance—the supposed "impossibility" created by the Central District's suspension of jury trials—that was *not* specific to Olsen's case. This gets the requirement exactly backwards. It also creates another circuit split, because every other circuit to address this issue has held that an ends-of-justice continuance may be granted only for case-specific reasons. *See, e.g.*, *United States v. Huete-Sandoval*, 668 F.3d 1, 5 (1st Cir. 2011) (holding that time could not be excluded under this provision where the trial court "omitted the necessary case-specific cost-benefit analysis"); *United States v. White*, 679 F. Appx. 426, 430 (6th Cir. 2017) ("A delay under § 3161(h)(7) is excludable if the district court makes case-specific findings."), *vacated on other grounds*, 138 S. Ct. 641 (2018); *United States v. Dignam*, 716 F.3d 915, 921 (5th Cir. 2013) (same); *United States v. Henry*, 538 F.3d 300, 303 (4th Cir. 2008) (same).

Fifth, the Ninth Circuit erred in approving a district-wide ban on jury trials with no specified end date. App. 77a. The circuits have long been divided on this question. In the Second Circuit, an ends-of-justice continuance must be "limited in time" to a specified period, at the end of which "a trial court

should set at least a tentative trial date." *United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995). By contrast, several other circuits have held that a District Court may grant an open-ended ends-of-justice continuance in some circumstances. *See United States v. Barnes*, 159 F.3d 4, 13 n.5 (1st Cir. 1998); *United States v. Lattany*, 982 F.2d 866, 881 (3d Cir. 1992); *United States v. Jones*, 56 F.3d 581, 585-86 (5th Cir. 1995); *United States v. Spring*, 80 F.3d 1450, 1458 (10th Cir. 1996). Courts and commentators have been noting this split for many years. *See United States v. Westbrook*, 119 F.3d 1176, 1187 & n.4 (5th Cir. 1997); Greg Ostfeld, *Speedy Justice and Timeless Delays: The Validity of Open-Ended "Ends-of-Justice" Continuances Under the Speedy Trial Act*, 64 U. Chi. L. Rev. 1037 (1997).

In short, the Ninth Circuit has badly misconstrued the Speedy Trial Act. It has so drastically weakened the statutory requirements for granting an ends-of-justice continuance that it is hard to imagine a case that would not qualify for one. Any time a court within the Ninth Circuit wishes to delay a trial, it can now simply declare that no trials will occur, and it can cite its own declaration as proof that trials are "impossible." Or the court can decide that dismissing the indictment would be a "miscarriage of justice." The court can even count the absence of evidence on these points as reasons to grant the continuance, by placing the burden of proof on the defendant rather than on the government. And the court can do all of this without making any of the case-specific findings that the Speedy Trial Act requires and without even setting an end date for the contin-

uance. Rarely have so many errors been packed into a single opinion.

Because of these errors, many defendants were stuck in jail for well over a year, awaiting trials that kept getting pushed further and further into the future. The Central District made the problem even more Kafkaesque by convening grand juries nearly a year before it resumed holding trials, which required the jailing of ever more defendants as the indictments mounted. For nearly a year, criminal justice in the Central District was an assembly line with an entrance but no exit.

Defendants who were not in jail, like Jeffrey Olsen, nevertheless spent long periods "living under a cloud of anxiety, suspicion, and often hostility," *Barker v. Wingo*, 407 U.S. 514, 533 (1972), caused by the unresolved charges against them. "Inordinate delay between public charge and trial," the Court has recognized, "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Taylor*, 487 U.S. 326, 340 (1988) (citation, brackets, ellipses, and internal quotation marks omitted).

This case is an excellent vehicle despite its formally interlocutory posture. Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status—particularly if the lower court's decision is patently incorrect." Eugene Gressman et al., *Supreme Court*

Practice ch. 4.18, at 281 (9th ed. 2007). For this reason, the Court often grants certiorari in cases like this one, where the Court of Appeals reversed a case-ending pretrial judgment for the defendant and remanded for trial. *See, e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam); *Bates v. United States*, 522 U.S. 23 (1997); *Solorio v. United States*, 483 U.S. 435 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

The Court also reviews cases that involve its "significant interest in supervising the administration of the judicial system" to ensure "compliance with proper rules of judicial administration," particularly "when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam); *see, e.g.*, *id.* at 184-85 (addressing whether the District Court improperly changed its rules regarding the broadcasting of trials shortly before trial was to begin); *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (addressing whether the judgment of the Court of Appeals was invalid because of the presence of a non-Article III judge on the panel). It is hard to think of a question that more directly implicates the integrity of judicial processes than whether the majority of judges in a district can vote into place a months-long suspension of jury trials that precludes other judges within the district from holding trials they find to be required by the Speedy Trial Act.

II. The Court should decide whether a District Court may dismiss an indictment with prejudice as a remedy for a violation of the Speedy Trial Act where the court, not the prosecutor, is principally at fault for the delay.

The Court of Appeals also erred in holding that the District Court was required to dismiss the indictment without prejudice rather than with prejudice. This part of its decision creates another circuit conflict.

The Speedy Trial Act provides that if trial does not begin within the statute's time limit, the "indictment shall be dismissed." 18 U.S.C. § 3162(a)(2). The Act further provides: "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Id.* As this Court has observed, "Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation." *Taylor*, 487 U.S. at 334. Rather, courts may choose either type of dismissal, so long as they "consider at least the three specified factors." *Id.* at 333.

The District Court duly considered the three statutory factors. App. 140a-144a. The court found that the "seriousness of the offense" factor weighed in favor of dismissal without prejudice, because the charges were "extremely serious." *Id.* at 140a-141a. But the court found that the other two statutory fac-

tors weighed in favor of dismissal *with* prejudice. *Id.* at 141a-143a. In particular, the court found that "dismissing with prejudice is the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials." *Id.* at 143a.

The Ninth Circuit held that the District Court abused its discretion. *Id.* at 20a-23a. The Ninth Circuit faulted the District Court for failing to consider "the absence of any prosecutorial culpability in causing the delay." *Id.* at 22a. By dismissing with prejudice where the prosecution was not at fault, "[t]he district court therefore committed legal error." *Id.*

This holding creates a circuit split. Other circuits hold that dismissal with prejudice can be an appropriate remedy whether the prosecution *or the court* is at fault for the delay. *See, e.g.*, *United States v. Bert*, 814 F.3d 70, 80-81 (2d Cir. 2016) (approving dismissal with prejudice where there is "a pattern of neglect … either on the part of the government or the court"); *United States v. Blank*, 701 F.3d 1084, 1089 (5th Cir. 2012) ("Delay attributable to the trial court, just as delay attributable to the government, weighs in favor of dismissal with prejudice."); *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992) ("When a STA violation is caused by the court or the prosecutor, it weighs in favor of granting a dismissal with prejudice.").

The majority view is the correct one. Nothing in the text of the Speedy Trial Act limits dismissals with prejudice to cases in which the delay is the fault of the prosecutor rather than the court. Where the court is responsible for the delay, a District Court acts well within its discretion by dismissing the in-

dictment with prejudice where the statutory factors point in that direction.

Here, the District Court correctly determined that dismissal with prejudice would be the only way to secure appellate review of the Central District's ban on jury trials while the ban was still ongoing. *Cf. Taylor*, 487 U.S. at 342 ("[D]ismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures."). Had the District Court dismissed the indictment without prejudice, the prosecution would simply have refiled the case. And had the District Court not dismissed the indictment at all, Olsen would not have been able to appeal that decision until after his trial was over, which would necessarily have been long after the Central District's ban on jury trials ended. Dismissal with prejudice was the only way to obtain meaningful appellate review of this important question, so the District Court did not abuse its discretion in choosing this remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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